KHIRUL IHSAN HUSSAIN

v.

PP

HIGH COURT MALAYA, ALOR SETAR
KN SEGARA J
[CRIMINAL APPEAL NO: 42-2-1999]
19 JUNE 1999

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 12(2) and 39A - Possession of more than 5 grammes of heroin - Sentence - Whether punishable section is s. 39A(1) or s. 39A(2) - Accused convicted under s. 39A(1) - Whether correct - Whether court or PP may invoke s. 39A(1) if subject matter of charge not within amount specified in s. 39A(1)*

CRIMINAL PROCEDURE: *Sentence - Possession of drugs - More than 5 grammes of heroin - Whether punishable section is s.39A(1) or s. 39A(2) of Dangerous Drugs Act 1952 - Accused convicted under s. 39A(1) - Whether correct - Whether court or PP may invoke s. 39A(1) if subject matter of charge not within amount specified in s. 39A(1)*

The appellant pleaded guilty to a charge under s. 12(2) of the Dangerous Drugs Act 1952 ('the Act') for possession of 5.95 grammes of heroin. He was convicted and sentenced to four years' imprisonment and ordered to be given three strokes of the rotan under s. 39A(1) of the Act. The appellant appealed against sentence.

Held:

[1] When a person is charged for an offence under s. 12(2) of the Act relating to certain dangerous drugs of the prescribed amount referred to in s. 39A of the Act, the punishable section under the Act which shall be invoked if he is found guilty of the offence and convicted is determined by the amount (weight) of the subject matter of the charge. If the subject matter of the charge is heroin and its weight is 2 grammes or more but less than 5 grammes, the punishable section would be s. 39A(1) of the Act. However, if its weight is 5 grammes or more then the punishable section is s. 39A(2).

[2] In this appeal, the subject matter of the charge was 5.95 grammes of heroin. Neither the court nor the public prosecutor has any discretion to invoke s. 39A(1) of the Act if the subject matter of the charge is not within the prescribed amount under s. 39A(1) of the Act. Therefore, the sentence under s. 39A(1) of the Act is wrong in law. The appellant should be sentenced under s. 39A(2) of the Act.

[Appeal dismissed; sentence set aside; minimum sentence under s. 39A(2) imposed.]

Legislation referred to:
Criminal Procedure Code, s. 316
Dangerous Drugs Act 1952, ss. 12(2), 39A(1), (2), 39B(1)(a)

For the appellant - Tay Chai Huat; M/s Tay Chai Huat & Co
For the respondent - Ahmad Zaidi Ibrahim DPP

Reported by S Dharmendran

JUDGMENT

KN Segara J:

The appellant was produced before the magistrate at Gurun on 2 August 1998 charged with the offence of trafficking in 30 grammes of heroin, that is, for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act"). The case was fixed for mention by the magistrate on 4 October 1998 pending the requisition from the public prosecutor to have the case tried in the High Court. However, on 4 October 1998 the learned magistrate transferred the case to the Sessions Court, Sg. Petani, upon the prosecution tendering an amended charge under s. 12(2) of the Act for possession of 5.95gm of heroin and punishable under s. 39A(2) of the said Act.

On 5 October 1998 the appellant appeared before the Sessions Court Judge, Sg. Petani and claimed trial to the amended charge punishable under s. 39A(2) of the Act. The charge was fixed for **hearing** before the Sessions Court Judge on 6 January 1999.

On 6 January 1999 the appellant was represented by counsel and the learned DPP appeared for the prosecution. The learned DPP then tendered a purportedly (further) "amended" charge.

The amended charge to which the appellant claimed trial on 5 October 1998 when he was first produced before the Sessions Court Judge reads as follows:

> Bahawa kamu pada 26hb Julai 1998, jam lebih kurang 2300 hrs, di pinggir Kampong Jeniang, Gurun, di Daerah Kuala Muda, di dalam Negeri Kedah, telah didapati memiliki Dadah Merbahaya iaitu *heroin seberat 5.95 gram.* Oleh itu kamu telah melakukan *kesalahan di bawah seksyen 12(2)* Akta Dadah Berbahaya 1952 (Pindaan 1983) dan *boleh dihukum di bawah seksyen 39(A)(2) Akta* yang sama.

The purportedly "amended" charge tendered by the learned DPP on 6 January 1999, at the date the trial was scheduled to commence before the Sessions Court Judge reads:

Bahawa kamu pada 26hb Julai, 1998, jam lebih kurang 11.00 malam, di pinggir Kampong Jeniang, Gurun, di Daerah Kuala Muda, di dalam Negeri Kedah, telah didapati memiliki dadah merbahaya iaitu *heroin seberat 5.95 gram* tanpa kebenaran yang sah oleh itu kamu telah melakukan *kesalahan di bawah Seksyen 12(2)* Akta Dadah Berbahaya 1952 (Pindaan 1983) dan boleh *dihukum di bawah Seksyen 39A(1)(a) Akta* yang sama. (emphasis in italics provided)

The appellant pleaded guilty to the purportedly "amended" charge tendered on 6 January 1999. He understood the nature and consequence of his plea. Upon admitting the facts adduced and the exhibits tendered the appellant was found guilty as charged and convicted. He was sentenced to four years imprisonment from the date of arrest and ordered to be given three strokes of the rotan under s. 39A(1) of the Act. The appellant appealed against the sentence.

Briefly, the facts to which the accused admitted and upon which he was convicted for an offence under s. 12(2) of the Act were as follows:

Pada 26.7.1998 sepasukan polis yang diketuai oleh Sjn. Mejar Ahmad Bashah bin Abd. Halim (Pengadu) telah membuat satu intipan (ambush) di pinggir kampung Jeniang, Gurun, Kedah (Tempat Kejadian).

Jam lebih kurang 11.00 malam tarikh yang sama OKT telah dilihat melalui tempat ambush tersebut dengan berjalan kaki. Apabila Pengadu memperkenalkan diri sebagai polis, OKT telah melarikan diri. OKT telah dikejar dan dilihat membuang sebuah beg "pouch" ke tanah. OKT berjaya ditangkap dan beg yang dibuang dirampas.

Hasil siasatan ke atas beg "Pouch" tersebut, Pengadu mendapati ianya berisi antara lain, sebanyak 6 peket plastik yang mengandungi bahan yang disyaki heroin.

Barang kes disahkan sebagai heroin sepertimana yang disenaraikan di dalam jadual pertama Akta Dadah Merbahaya 1952 seberat 5.95 gram.

At the hearing of the appeal against sentence before me, the appellant was represented by the same counsel who represented him in the Sessions Court. The learned DPP who appeared for the respondent was also the same learned DPP who appeared in the Sessions Court. I brought to the attention of the learned defence counsel and the learned DPP that although the appellant was charged for an offence under s. 12(2) of the Act, the subject matter of offence was **heroin** weighing **5.95 grammes** and, therefore, required the lawful punishable section provided under the Act to be invoked for purposes of sentencing.

The Act has introduced under s. 39A two distinct sub-sections which provide for mandatory increased penalty in respect of an offence against the act where the subject matter of the offence is the prescribed amount of certain dangerous drugs. Section 39A(1) provides:

> Every person found guilty of an offence against this Act where the subject matter of the offence is -
>
> (a) 2 grammes or more but less than 5 grammes in weight of heroin;
>
> (b) ...
>
> to
>
> (z) ...
>
> *shall,* instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, *be punished with imprisonment for a term which shall not be less than two years* but shall not exceed five years, *and he shall also be punished with whipping of not less than three strokes* but not more than nine strokes.

39A(2) provides:

> Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is -
>
> (a) *5 grammes or more* in weight of heroin;
>
> (b) ...
>
> to
>
> (z) ...
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, *be punished with imprisonment for life or for a term which shall not be less than five years,* and he *shall also be punished with whipping of not less than* ten strokes. (emphasis in italics provided)

Now, when a person is charged for an offence under s. 12(2) of the Act relating to certain dangerous drugs of the prescribed amount referred to in s. 39A, then the punishable section under the Act which shall be invoked if he is found guilty of the offence and convicted **is determined by the amount (weight) of the subject matter of the charge.** For example, if the subject matter of the charge is heroin and its **weight** is **two grammes or more but less than five grammes** then the punishable section would be s. 39A(1) of the Act. However, if its weight is **five grammes or more** then the punishable section is s. 39A(2) of the Act.

In this appeal before me, the subject matter of the charge was **5.95 grammes of heroin.** Therefore, any sentence passed under the provisions of s. 39A(1) of the act would be patently wrong and unlawful. A valid sentence, in the circumstances, shall only be one meted out under the provisions of s. 39A(2) of the Act. Neither the court nor the public prosecutor has any discretion to invoke s. 39A(1) **if the subject matter of the charge is not within the prescribed amount under s. 39A(1)** of the Act.

The learned Sessions Court Judge sentenced the appellant to four years imprisonment and three strokes of the rotan under s. 39A(1) of the Act. The sentence under s. 39A(1) of the Act is wrong in law because the subject matter of the charge is 5.95 grammes of heroin. The appellant should be sentenced under s. 39A(2) of the Act. The learned defence counsel pleaded for the minimum sentence under the law to be passed on the appellant as the appellant had admitted to the charge.

The minimum sentence under s. 39A(2) is a term of five years imprisonment and ten strokes of the rotan. This would mean enhancing the sentence imposed on the appellant by the learned Sessions Court Judge.

Section 316 criminal procedure code provides:

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may -
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> (a) ...
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> ...
>
> (b) ... in an appeal as to sentence (1) ...
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> ...
>
> ... (2) ...
>
> ..., or with or without altering the finding reduce or *enhance* the sentence ...
>
> (c) ...
>
> (emphasis in italics provided)

In the above circumstances, the sentence imposed by the learned Sessions Court Judge under s. 39A(1) is set aside. The minimum mandatory sentence prescribed under s. 39A(2) is imposed in substitution. The appellant is therefore sentenced to five years imprisonment from date of arrest and ordered to be given ten strokes of the rotan.

Appeal dismissed and sentenced enhanced.